

FILED

DEC 19 2002

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TALITHA FALKENBURG, et al.,

Plaintiff,

No. CIV-S-01-1478 DFL GGH

vs.

COUNTY OF YOLO, et al.,

Defendants.

ORDER

INTRODUCTION

Presently pending is plaintiffs' motion pursuant to Fed. R. Civ. P. 37, filed October 22, 2002, for preclusion and monetary sanctions against defendant County of Yolo.¹ In this civil rights action which follows an inmate suicide at the Yolo County Jail, plaintiffs seek to hold the county ("Yolo") liable, on multiple theories, for, inter alia, deliberate indifference to the decedent's medical needs. Plaintiffs must establish that Yolo had a pattern and practice of such conduct in order to find it liable. See Monell v. Department of Social Servs., 436 U.S. 658, 690, 98 S. Ct. 2018, 2035 (1978). Plaintiffs contend Yolo has failed to meet its discovery obligations and has violated a May 22, 2002 discovery order.

¹ Individual Yolo County officials have been sued; however, this motion involves only Yolo County.

1 Although the court finds herein that the conduct of Yolo necessitates some
2 sanctions, albeit not the case-killing ones so vigorously argued by plaintiffs, the court also finds
3 fault on both sides. No evidence was presented to the court that either party took advantage of
4 the discovery planning provisions required by Fed. R. Civ. P. 26(f), or barring agreement, took
5 any planning problems to the undersigned. Discovery problems are much more easily rectified if
6 they are anticipated as opposed to a fait accompli. Problems involving breadth of discovery,
7 production logistic dates, numbers of depositions, or phased discovery could have been alleviated
8 by prior planning. Unfortunately, the discovery dynamics in this case have been “act,” “react”
9 and “no-act.”

10 BACKGROUND

11 The instant motion arises primarily from plaintiffs’ first motion to compel
12 discovery from Yolo, filed April 12, 2002.² Yolo had totally failed to respond to plaintiffs’
13 discovery propounded January 30, 2002. The court, hearing the motion on May 16, 2002, denied
14 it in part and granted it in part on the record. The court also issued a memorandum order
15 confirming that Yolo should “fully respond” to plaintiff’s discovery, delivering, on or before
16 May 23, 2002, “reasonably responsive” documents. Despite the court’s order, Yolo apparently
17 did not produce any new responsive documents until June 20, 2002.³ Thereafter, in a sort of
18 rolling production, Yolo apparently produced on the following dates the following additional
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20

21 ² The court issued its order on plaintiffs’ second motion on July 2, 2002. That order
22 dealt with Yolo’s failure to disclose contact information for a former inmate. The court found
23 Yolo’s behavior was not substantially justified, and levied monetary sanctions which were not
24 timely paid by the ordered date of July 22, 2002. The July 2, 2002 order is at issue in the instant
25 motion only insofar as it demonstrates some history of prior unjustified discovery behavior by
26 Yolo.

27 ³ Some documents apparently were produced earlier, but according to plaintiffs they were
28 duplicates of documents produced pursuant to an earlier served subpoena. The “new” documents
29 produced on June 20 apparently were documents related to accreditation and contracts with
30 CFMG, responsive to Requests Nos. 15 & 16.

1 categories of documents:⁴

2 July 9--Detention Facility Report & Suicide Watch Log;

3 August 27--pod logs;⁵

4 September 16--Green Book Logs;

5 September 18--medical care complaints, quality assurance documents, memos
6 regarding inadequate mental health care complaints, peer review documents, jail facility reports,
7 Title 15 compliance reports, medical statistical reports, statistical reports of inmate grievances,
8 and complaints from city supervisors regarding mental health care delivery. [Yolo states these
9 were all the peer review reports and quality assurance reports it had];

10 October 4--Supervisors Shift logs & Detention Facility Inspections;

11 October 23--past suicide attempt at the jail and some Detention Facility
12 Inspections.

13 It is clear that Yolo failed to fully and timely respond to plaintiffs' requests to
14 produce documents by the date set in the May oral and written orders.

15 THE MOTION FOR SANCTIONS

16 Primarily at issue in the motion for sanctions, in addition to the prejudicial effect
17 of Yolo's belated productions, were Yolo's substantive responses to Requests Nos. 13 and 14.⁶
18 In addition to complaining about the dilatory pace of producing what documents plaintiffs now
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20 ⁴ The court compiled these lists from both parties briefing in support of and in opposition
21 to the instant motion. No party's briefing was particularly helpful in assisting the court to
22 determine exactly what was produced when. Both parties have spilled much vituperative and/or
23 irrelevant ink, requiring excessive judicial resources in attempting to sort fact from hyperbole.
To the extent errors appear, both sides have waived any complaint. The gist of the court's
recitation is accurate. The point is that disclosures were not timely made, and documents
dribbled in as Yolo, apparently at its leisure, discovered them.

24 ⁵ The court is uncertain whether documents were produced on this date.

25 ⁶ No. 13 sought, for 7 years past, evaluations, investigations, reports, and complaints
26 regarding medical care at Monroe Detention Center. No. 14 sought records regarding suicides
and attempted suicides for the past 5 yrs.

1 have received, plaintiffs especially complain that the bulk of inmate grievances and reports of
 2 attempted suicides, covered by Requests Nos. 13 & 14, were not produced at all. Yolo concedes
 3 it has produced few inmate grievances or attempted suicide reports. Interposing untimely burden
 4 assertions to producing inmate grievances about medical care and reports of attempted suicides
 5 not already produced, Yolo asserts such documents are not easily accessible because they are in
 6 individual inmate files and would require searching approximately 80,000 files. Also
 7 importantly at issue is whether Yolo improperly redacted certain information from the documents
 8 already produced.

9 STANDARDS

10 Rule 37 authorizes "a wide range of sanctions" for a party's failure to comply with
 11 discovery rules or court orders enforcing them. Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d
 12 585, 589 (9th Cir. 1983). Penalizing a party "for dilatory conduct during discovery proceedings"
 13 is discretionary. Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093, 1102 (9th
 14 Cir. 1981) (citing Fed. R. Civ. P. 37(a)(4)).

15 Rule 37 is flexible, but the reason for the discovery transgression is important:

16 If the failure is because of inability to comply, rather than because
 17 of willfulness, bad faith, or any fault of the party, the action should
 18 not be dismissed, nor a default judgment given, and less severe
 sanctions are the most that should be invoked.

19 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure
 20 §2284 (1994).

21 Sanctions may be imposed for a range of improper conduct specifically identified
 22 in Rule 37, including delaying until after motion to produce discovery, Rule 37(a)(4), failing to
 23 obey court orders directing discovery, Rule 37(b), or failing properly to respond to discovery,
 24 Rule 37(d). The court may apportion expenses for discovery motions necessitated by inadequate
 25 disclosure. Rule 37(a)(4);(b)(2). Rule 37 also specifically allows issue or evidence preclusion
 26 sanctions for failure to obey court orders. Rule 37(b)(2)(B). Finally, Rule 37(c), specifically

1 directed to failures in Rule 26(a) “automatic” disclosures and Rule 26(e) failures to timely
 2 supplement previous discovery responses, permits a pot pourri of sanctions generally including
 3 all the possible sanctions under other subdivisions of Rule 37, but especially directed to
 4 precluding use of undisclosed information.⁷

5 In addition to Rule 37 sanctions, “[c]ourts are invested with inherent powers that
 6 are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their
 7 own affairs so as to achieve the orderly and expeditious disposition of cases.’” Unigard Sec. Ins.
 8 Co. v. Lakewood Engineering & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992) (quoting
 9 Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S. Ct. 2123, 2132 (1991)); accord
 10 Anheuser-Busch, Inc. v. Natural Beverage Distributors, 69 F.3d 337, 348 (9th Cir. 1995)
 11 (recognizing inherent power to dismiss counterclaim for concealing discovery documents); Winn
 12 v. Associated Press, 903 F. Supp. 575, 580 (SDNY 1995) (imposing monetary sanctions for
 13 deliberately impeding discovery and willful noncompliance with document production).

14 Precluding evidence so that the recalcitrant party cannot support defenses is
 15 comparable to entering dismissal, which “represent[s] the most severe penalty that can be
 16 imposed.” U.S. v. Kahaluu Const., 857 F.2d 600, 603 (9th Cir. 1988; accord, Valley Engineers
 17 v. Electric Engineering Co., 158 F.3d 1051 (9th Cir. 1998). Accordingly, such orders are
 18 authorized only in “extreme circumstances” of violations “due to willfulness, bad faith, or fault
 19 of that party.” Kahaluu Const., 857 F.2d at 603; see also Commodity Futures Trading Com'n v.
 20 Noble Metals Intern., Inc., 67 F.3d 766, 770 (9th Cir. 1995)(affirming standard and upholding
 21 sanctions in egregious circumstances).⁸ Bad faith does not require actual affirmations of ill will;

23 ⁷ Of course, this presumes that the withheld information would be “good” for the
 24 withholding party. In the event that the withheld information is “good” for the opposing party,
 the proper sanction would focus on issue determination.

25 ⁸ See also, e.g., Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1334, 1338 (9th
 26 Cir. 1985) (“Where the drastic sanction of dismissal . . . [is] imposed . . . the range of discretion
 is narrowed and the losing party’s non-compliance must be due to willfulness, fault, or bad

substantial and prejudicial obduracy may meet bad faith prerequisites. B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1108 (9th Cir. 2002).

Five other relevant factors also determine whether severe sanctions are appropriate:

- (1) the public's interest in expeditious resolution of litigation;
- (2) the court's need to manage its docket;
- (3) the risk of prejudice to the other party;
- (4) the public policy favoring disposition of cases on their merits;
- and
- (5) the availability of less drastic sanctions.

Wanderer v. Johnston, 910 F.2d 652 (9th Cir. 1990) (default judgment for defendants' failure to comply with discovery); Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir.1987).

The circuit has acknowledged that "[l]ike most elaborate multifactor tests, our test has not been what it appears to be, a mechanical means of determining what discovery sanction is just." Valley Engineers Inc. 158 F.3d at 1056. Inevitably where a court order is violated or discovery belatedly is produced, factors 1 and 2 support preclusive sanctions, and factor 4 cuts against them. Accordingly, factors 3 and 5 become the decisive factors. The court must focus on the prejudice to the party seeking sanctions and the availability of less drastic sanctions. Adriana International Corp. v. Thoeren, 913 F.2d 1046, 1412 (9th Cir. 1990). Most critical for evaluating the risk of prejudice and whether less drastic sanctions would suffice is whether the discovery violations "so damage[] the integrity of the discovery process that there can never be assurance of proceeding on the true facts." Valley Engineers Inc., 158 F.3d at 1058.

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faith,"" quoting Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir.1981); G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647-48 (9th Cir.1978) (bad faith crucial in Rule 37 dismissal, citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S. Ct. 2778 (1976)); Henry v. Gill Industries, Inc., 983 F.2d 943, 946, 948-49 (9th Cir.1993) (reviewing Rule 37 dismissal under multiple factors, including willfulness, bad faith or fault); Porter v. Martinez, 941 F.2d 732, 733 (9th Cir.1991) (reviewing Rule 37 default judgment pursuant to multiple factors including bad faith); Wanderer v. Johnston, 910 F.2d 652, 655-56 (9th Cir.1990) (same).

1 APPLICATION

2 Yolo did not fully or timely comply with this court's prior May 16 and 23 orders.
 3 Plaintiffs still do not have all the documents to which they are entitled. Moreover, Yolo has
 4 redacted information from some of the discovery it did produce. As to Yolo's assertion that the
 5 burden of locating the inmate grievances and reports of attempted suicides is excessive, Yolo has
 6 waived any burden objection by its failure timely and specifically to make it. See Harding v.
 7 Dana Transport, Inc., 914 F. Supp. 1084, 1102 (D.N.J. 1996); Davis v. Fendler, 650 F.2d 1154,
 8 1160 (9th Cir. 1981) (objections should be plain and specific); 8 C. Wright & A. Miller, Federal
 9 Practice & Procedure: Civil § 2173. Having waived objections by failing timely to make them,
 10 Yolo was obliged to disclose inmate grievances and records of prior suicide attempts, or make
 11 available documents for inspection as they are kept in the usual course of business. Fed. R. Civ.
 12 P. 34(b) ("A party who produces documents for inspection shall produce them as they are kept in
 13 the usual course of business or shall organize and label them to correspond with the categories in
 14 the request.").⁹

15 Willfulness, Bad Faith, Fault.

16 Yolo submits that it has produced over 7,700 pages of documents as soon as they
 17 were specified and identified. The court cannot find substantial justification, however, for the
 18 "rolling production," causing delay in producing what it has produced, and the court is satisfied

19 ⁹ It is true that had the objections been timely made, Yolo may well have had a good
 20 opportunity to shape the ultimate production of documents given that the requests were
 21 overbroad, e.g., it is difficult to believe that even in this pattern and practice case, inmate
 22 complaints regarding not receiving desired cold medication and the like would have any
 23 significant impact involving alleged deprivation of appropriate psychiatric treatment. Moreover,
 24 plaintiffs would have to do more than simply point to a number of differing inmate complaints
 25 (inmates can be unreasonable in their perception of what medical services should be provided) in
 26 order for such complaints to have any valid nexus with the allegations herein. The validity of
 many individual complaints would have to be demonstrated.

Notwithstanding the above, defendants have a duty to timely determine what can or
 should be produced, and timely make objections with respect to those production requests to
 which they hold a principled belief that the requests are burdensome, unduly invade privacy and
 the like. Failure to take timely measures to combat burdensome requests places the court in a
 difficult position and ensures that discovery will be much more costly than it should have been.

1 that, at a minimum, Yolo is at fault in creating an unjustified delay. Likewise, the court finds
2 Yolo at fault in redacting inmate names from disclosed documents, rather than producing them
3 pursuant to an agreed upon protective order or one ordered by the court. No justification for such
4 behavior appears in the record. As to the inmate grievances and the reports of attempted
5 suicides, however, the court cannot find Yolo was willful, in bad faith, at fault, or guilty of
6 egregious behavior in its refusal to disclose the information. While Yolo has waived its burden
7 arguments by failure timely to assert them, Yolo has consistently informed plaintiffs' counsel
8 that it did not intend to review 80,000 pages of documents to discover this information. Yolo
9 may be mistaken in its belief that the belated, informal burden objection would preclude
10 disclosure. However, the mistake does not rise to the level of egregious conduct to justify
11 precluding evidence on plaintiffs' pattern and practice claims.

12 Prejudice

13 As to the records which have been belatedly produced, plaintiffs have been
14 prejudiced because they took depositions of correctional officers and medical staff without
15 benefit of later produced documents. Plaintiffs were unable, for example, to question some
16 county correctional and medical staffer deponents about certain records belatedly produced. No
17 satisfactory justification for the delay has been proffered by Yolo, and the court has found it was
18 not substantially justified. Yolo also was unjustified in unilaterally redacting certain information
19 in the documents which have been produced. While Yolo has proffered that certain redactions
20 were made to protect third party privacy, Yolo, for the same reasons it waived its burden
21 objections, has waived any privacy objections, which objections in any event can be met by
22 appropriate protective order. Plaintiffs have been prejudiced by not being able to question
23 certain persons who made complaints or reported irregularities. Finally, in addition to the
24 prejudice occasioned by the delay, plaintiffs were prejudiced by the need to bring this motion.
25 Accordingly, the court is satisfied that plaintiffs have been prejudiced by Yolo's belated
26 discovery disclosures.

1 The amount of substantive prejudice suffered by plaintiffs due to defendants delay
2 is more difficult to evaluate. Plaintiffs contend their experts were unable to issue reports without
3 the delayed information.¹⁰ As noted, the District Judge now has extended discovery deadlines,
4 including expert discovery. Plaintiffs contend that they need to redepose certain individuals.
5 Yolo has offered to make available for redeposition certain individuals. Plaintiffs argue they
6 have lost the “surprise” element. That argument, however, cuts both ways. For example,
7 plaintiffs argue that belatedly produced information contradicts testimony of witness Snow, and
8 had they had the information they could have confronted him at the deposition. Had the
9 information been available, however, it is equally possible that witness Snow might have
10 testified in conformity with the now disclosed documentation.

11 As to information not yet disclosed, including inmate grievances, reports of
12 attempted suicides, and redacted names, the amount of prejudice has been lessened by the
13 extended discovery cut-off and expert report dates. Because the court will direct Yolo to further
14 investigate concerning attempted suicides, and permit plaintiffs to review the records themselves
15 if they believe the burden of searching them outweighs the benefit likely to be obtained, the
16 court’s confidence in the integrity of the process remains strong. As to inmate grievances about
17 medical care, the court finds the benefit to be obtained by obtaining inmate grievances about
18 medical care to be somewhat remote. Accordingly, the court cannot find the degree of prejudice,
19 if any, to be significant. Plaintiffs will be permitted to review the records as they are kept in the
20 ordinary course of business for inmate grievances if they believe the burden of searching for such
21 is outweighed by the benefit to be obtained. As to redacted names, the prejudice, if any, can be

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23 ¹⁰ The court is not persuaded that plaintiffs’ experts were entirely unable to issue reports
24 concerning their testimony on account of Yolo’s dilatory discovery actions. While the belated
25 and non-produced discovery may have had substantial impact on the ability to form opinions in
26 the pattern and practice area, the belated and non-produced discovery would have little impact on
the ability to form opinions related to the specific care that plaintiffs’ decedent received,
including causation opinions. Furthermore, to the extent that other defendants have not timely or
properly complied with their discovery obligations, thereby leading to delay in issuance of expert
opinions, such action by other defendants should not be visited upon Yolo.

1 remedied by disclosure of the names subject to an appropriate protective order.

2 Integrity of the Process.

3 Having found plaintiffs to be prejudiced in varying degrees, the court must now
4 determine whether the discovery violations "so damage[] the integrity of the discovery process
5 that there can never be assurance of proceeding on the true facts." The court cannot make such a
6 conclusion. In light of the extensive discovery which has taken place, and the extended
7 discovery cut off permitting depositions to be retaken (at the expense of Yolo if cause to retake
8 them is shown) and further disclosures to be made, the court cannot find the integrity of the
9 process so damaged that there is no assurance of proceeding on the true facts. The court has
10 fashioned lesser sanctions which will alleviate the prejudice and assure that the case will be
11 resolved on the merits.

12 CONCLUSION

13 While the court finds Yolo guilty of some willful behavior in its belated discovery
14 conduct, the court does not find preclusion sanctions to be justified. The discovery violations
15 may be remedied by less drastic measures. The court does find monetary sanctions to be
16 appropriate for Yolo's discovery conduct in this case. Moreover, the court will direct Yolo to
17 conduct further investigation, disclose redacted information, and make files available to plaintiffs
18 for their own review. Accordingly, Yolo's conduct has not so infected the proceedings that the
19 court entertains doubt that the case can be resolved on its merits. The integrity of the process
20 may be maintained by less drastic sanctions than preclusion.

21 Accordingly IT IS ORDERED that:

22 1. Plaintiffs' motion for preclusion sanctions is DENIED.

23 2. Plaintiffs' motion for monetary sanctions is GRANTED as follows: Plaintiffs
24 will be granted costs and expenses in bringing the instant motion. The court declines to levy
25 monetary sanctions for the prior May motion. Having reviewed the Declarations of Douglas and
26 Neville Johnson, the court will award sanctions at the hourly rate of \$250.00/hr. for Neville

1 Johnson and \$200.00 per hour for Douglas Johnson. Hours expended by Rebecca Sorgen will be
2 recompensed at \$100.00/hr. The total hours allowed are as follows:

3 Neville Johnson– 6.6 hours (2 hour reduction for work on Reply Brief)

4 Douglas Johnson– 40 hours (5 hour reduction in time spent on drafting papers)

5 Rebecca Sorgen– 15 hours (reduction of 2 hours)

6 Therefore, sanctions are awarded in the total amount of \$11,150.00.

7 3. Plaintiffs will be permitted to conduct redepositions of correctional staff and
8 medical personnel necessitated by the belated disclosures Yolo already has made. In the event
9 plaintiffs and Yolo cannot agree on who should be redeposed, plaintiffs shall file, within 14 days
10 from the date this order is filed, declarations detailing who needs to be deposed and why.

11 Thereafter, the court will act as expeditiously as possible to resolve any disagreements. Yolo
12 shall pay for court reporter and transcript costs as if they had noticed the retaken depositions
13 themselves. Plaintiffs shall pay for costs of copying any deposition transcripts.

14 4. Documents previously produced in redacted form shall be produced in
15 unredacted form subject to agreed upon protective order which will protect the substantial
16 privacy rights of third parties;

17 5. As to reports of attempted suicides, plaintiffs shall provide defendants with
18 names, i.e. known, within ten days. To the extent Yolo, after good faith inquiry of appropriate
19 personnel, can identify any inmates (even those for whom names were not given) who attempted
20 suicide within the relevant time frame, Yolo shall provide those records to plaintiffs. Yolo shall
21 file with the court, within 14 days after this order is filed, declarations from appropriate
22 managerial personnel detailing the nature and extent of the investigation to identify such
23 attempted suicides. As to inmate grievances, plaintiffs contend some names are available in the
24 Green Book and shift logs. (Reply at 13:45) Plaintiffs shall provide Yolo with names within ten
25 days. Therefore, Yolo shall provide plaintiffs with said grievances, if any. Thereafter, if
26 plaintiffs wish to discover further attempted suicide reports, or inmate grievances about medical

1 care, Yolo shall make available to plaintiffs, as kept in the ordinary course of business, inmate
2 records from which such information can be discovered. Inmate records, if reviewed, shall be
3 subject to an appropriate agreed upon protective order.

4 DATED: December 19, 2002.

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6 
7 GREGORY G. HOLLOWES
8 UNITED STATES MAGISTRATE JUDGE

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falkenburg.ord3.wpd

United States District Court
for the
Eastern District of California
December 19, 2002

* * CERTIFICATE OF SERVICE * *

2:01-cv-01478

Falkenburg

v.

County of Yolo

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 19, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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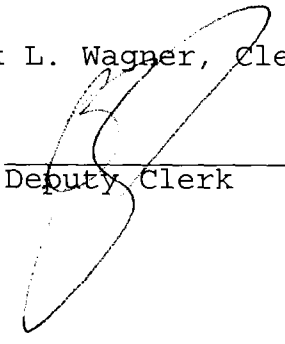
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Peter George Bertling
Bertling and Clausen

Jack L. Wagner, Clerk

BY:


Deputy Clerk

United States District Court
for the
Eastern District of California
December 20, 2002

* * CERTIFICATE OF RE-SERVICE * *

2:01-cv-01478

Falkenburg

v.

County of Yolo

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 20, 2002, I RE-SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Deputy Clerk